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RECENT CASES.

EVIDENCE—DYING DECLARATION.—In a trial for homicide, a dying declaration of the deceased, "That man murdered me," referring to the defendant, was offered in evidence. *Held*: It was error to admit this evidence, on the grounds that "murder," implying a felonious homicide, a killing with malice aforethought and intention, was an opinion or conclusion of the declarant. *Pilcher v. State*, 77 So. 75 (Ala. 1917).

The learned court, with great astuteness, distinguishes the declaration of the principal case from a somewhat similar declaration, "He killed me," admitted in evidence in the case of *Parker v. State*, 10 Ala. App. 53 (1914). Such a distinction, while calculated to promote the cause of legal education among dying declarants, is hardly likely to prove itself a tower of defense against the oft-repeated assaults upon technicalities of the law. It is surprising to find that the court made the distinction at all, and did not flatly overrule the earlier case on the ground that the declaration, "He killed me," was obviously a conclusion on the part of the deceased, he not yet having died. Strangely enough, however, the principal case does not seem to stand alone in its conclusion. *Bateson v. State*, 46 Tex. Crim. R. 34 (1904): "They have murdered me without cause," excluded; *State v. Horn*, 204 Mo. 528 (1906): "I fired in self-defense," excluded. *Contra*, *State v. Mace*, 118 N. C. 1244 (1896): "They have murdered me for nothing in the world," admitted; also, *dicta*, in *State v. Baldwin*, 79 Ia. 714, 721 (1890).

The application of the opinion rule to dying declarations has often lead to ludicrous results. Thus learned arguments and solemn decisions are to be found on the question whether dying declarations such as "He butchered me," or "He shot me down like a dog," are to be excluded from the charmed circle of evidence, because they constitute only the opinion of the declarant. *State v. Gile*, 8 Wash. 12 (1894); *State v. Saunders*, 14 Ore. 300 (1886); *White v. State*, 100 Ga. 659 (1897). The decisions have also been very often conflicting, and in view of the nature of dying declarations, and their importance as evidence, generally unsatisfactory. For example, a statement that the deceased knew the accused had poisoned him, had given him his dose in a drink of whiskey, was excluded despite its apparent evidentiary value. *Berry v. State*, 63 Ark. 382 (1897). On the other hand, an unchivalrous court admitted a declaration, "I know my mother-in-law poisoned me," though the declarant had no better grounds for her statement than existed in the former case. *Shenkenberger v. State*, 154 Ind. 630 (1900); *semble*, *Lipscomb v. State*, 75 Miss. 559 (1897).

These questions have arisen entirely on the theory that dying declarations are subject to the same rules which govern other evidence, and that, as has frequently been said, they are admissible only when they could be given by the declarant if he were living and sworn as a witness. *People v. Wasson*, 65 Cal. 538, 539 (1884); *Boyle v. State*, 105 Ind. 470, 472 (1885);

State v. Elkins, 101 Mo. 344, 351 (1890). This position is fallacious. The only reason that opinion evidence is ever excluded is that the witness's opinion is regarded as superfluous, and the jury supposed to be equally competent to draw the correct conclusion without the aid of that opinion, where the pertinent facts can be specifically detailed and described. *Cornell v. Green*, 10 S. & R. 14, 16 (Pa. 1823); *Clifford v. Richardson*, 18 Vt. 620, 626 (1846); *Evans v. People*, 12 Mich. 27, 35 (1858); *B. & O. R. Co. v. Schultz*, 43 O. St. 270 (1885). However, in the case of dying declarations, it is impossible to obtain from the witness any more details than are contained in the declaration, so that the declarant's inferences from things within his knowledge are actually of the greatest value. Since, by the very nature of the case, the statements of the deceased must often be the most important, and perhaps the only evidence in the case, it is obvious that such testimony should not be excluded merely because it represents a conclusion, provided it is based on the declarant's knowledge.

Of course, where the declaration is simply a guess, it ought not to be admitted. The declarant must have had actual opportunity for observation, and his statement must be made of personal knowledge. Courts have therefore very properly excluded statements where it appears from the declaration itself, or from other circumstances, that the deceased had, or could have had, no knowledge of the fact asserted, but was making a pure conjecture. *Binns v. State*, 46 Ind. 311 (1874); *Jones v. State*, 52 Ark. 345 (1889); *State v. Burnett*, 47 W. Va. 731 (1900). But the grounds of such exclusion should be, not the opinion rule, but the lack of personal knowledge or observation.

The rule against opinion evidence has been almost universally applied to dying declarations, though a few exceptions have been made in individual jurisdictions. Thus it was early held in Kentucky that declarations of mere opinion were admissible when in favor of the accused, to explain his conduct or motives. *Haney v. Commonwealth*, 5 Ky. L. Rep. 203, 205 (1883). It has also been held that such declarations, whether favorable to the accused or not, are admissible when facts on which the opinion might be founded, are peculiarly within the declarant's knowledge, even though such facts are not stated in the declaration. *State v. Lee*, 58 S. C. 335, 355 (1900); but *contra*, *Sweat v. State*, 107 Ga. 712 (1899). These are but a small step, however, and it seems likely that many of the absurd results of subjecting dying declarations to the rule against opinion evidence will remain.

NEGLIGENCE—DEGREES OF NEGLIGENCE.—Owner of an automobile invited the plaintiff to ride with him, and, through the negligence of the chauffeur in running the car, the plaintiff was injured. *Held*: Plaintiff was not entitled to recover, because he had failed to prove gross negligence. *Massalatti v. Fitzroy*, 118 N. E. 168 (Mass.).

The extent to which degrees of negligence exist at common law is a much mooted point. One would suppose that since *Coggs v. Barnard*, 2 Ld. Raym. 909 (1703), it would be settled that there were such degrees. But much doubt has been thrown on the doctrine by later English cases, in

which gross negligence was called merely ordinary negligence plus a vituperative epithet. *Wilson v. Brett*, 11 M. & W. 113 (1843). But it may be assumed from the language of the courts in *Giblin v. McMullen*, L. R. 2 P. C. 317 (1868); and *Moffat v. Bateman*, L. R. 3 P. C. 115 (1869), that the doctrine is now established in England.

Of course it is plain that under different circumstances, different degrees of care would be required. The doctrine that degrees of negligence exist is not that any material departure from the standard of what is reasonable under the circumstances, but either a very slight departure only, or a very grave departure, may be required to constitute actionable negligence. Some courts have flatly denied that such degrees exist or are of practical importance. *Oregon Co. v. Roe*, 176 F. 715 (1910); *Colorado & S. Ry. v. Webb*, 36 Col. 224 (1906); *McPheeters v. Hannibal & St. J. R. R. Co.*, 45 Mo. 22 (1870); *Missouri, Pacific Ry. Co. v. Watters*, 96 Pac. 346 (Kansas 1908); *Vandalia R. R. v. Clem*, 96 N. E. 789 (1911); *Reeves v. Lutz*, 162 S. W. 280 (1913). Other courts hold that liability does not depend on the degree of negligence, though the damages may. *Denny v. Chicago, R. I. & P. R. R.*, 130 N. W. 363 (1911); *Western Union Telegraph Co. v. Catlett*, 177 Fed. 71 (1911). Others still have flatly denied this doctrine, and asserted, in accord with the principal case, that liability may depend on the degree of negligence. *Louisville & N. R. R. Co. v. Sheets*, 11 Ky. Law Rep. 781 (1890); *Chesapeake & Ohio R. R. Co. v. Dodge*, 23 Ky. Law Rep. 1959 (1902); *Belt Ry. Co. v. Banicki*, 102 Ill. App. 642 (1902); *Astin v. Chicago, M. & St. P. R. R.*, 143 Wis. 477 (1910).

If there are degrees of negligence, what is gross negligence? Some courts hold that it implies an intent, either to do the negligent act, knowing it to be negligent, or an intentional failure to act, wilfulness in short. *Giblin v. McMullen*, L. R. 2 P. C. 317 (1868); *Denman v. Johnston*, 85 Mich. 387 (1891); *Rideout v. Winnebago Traction Co.*, 123 Wis. 297 (1904). Other courts hold that either wilfulness, or a reckless and wanton disregard for the safety of others is sufficient. *Willard v. Chicago, N. W. Ry. Co.*, 136 N. W. 646 (1912); *Strong v. Western Union Tel. Co.*, 109 Pac. 91 (1909). Still others insist that even gross negligence is always something short of wilfulness. *Lincoln v. Buckmaster*, 32 Vt. 652 (1859); *Terre Haute Ry. Co. v. Graham*, 95 Ind. 293 (1883); *Jacksonville & S. E. R. R. Co. v. Southworth*, 135 Ill. 250 (1890); *Parker v. Pennsylvania Co.*, 134 Ind. 673 (1892); *Cleveland, etc., R. R. Co. v. Starks*, 92 N. E. 54 (1910).

Some courts hold that gross negligence is want of slight care when that only is required, and slight negligence is the want of great care when that is required, and not a slight want of ordinary care. *R. R. Co. v. Lockwood*, 17 Wall. 357 (1872); *Griffin v. Town of Willow*, 43 Wis. 509 (1877); *Lothian v. Western Union Tel. Co.*, 126 N. W. 621 (1910). But the majority of courts seem to hold that gross negligence is simply a degree of negligence materially greater than ordinary negligence. *Louisville & N. R. R. Co. v. McCoy*, 81 Ky. 403 (1883); *Devine v. N. Y., N. H. & H. R. R. Co.*, 205 Mass. 416 (1910); *Burton v. Construction Co.*, 162 Ky. 366 (1914).

The Massachusetts courts themselves have had grave difficulty in defining gross negligence. In *Dolphin v. Worcester Consolidated St. R. R.*, 189

Mass. 270 (1905), it was said that gross negligence may exist where only slight care is required, thus repudiating the doctrine that gross negligence is failure to exercise only slight care. In *Devine v. N. Y., N. H. & H. R. R.*, *supra*, it was held that gross negligence was simply worse than ordinary negligence. In *Martin v. Boston & Maine R. R.*, 205 Mass. 16 (1910), it was said that the highly dangerous consequences to be apprehended in one case might contribute to render that gross negligence which was not such in another case, thus confusing degree of negligence with the degree of care that in the circumstances constitutes reasonable care.

Where a count charges ordinary negligence, it has been held that proof of gross negligence is inadmissible. This is in a jurisdiction where gross negligence would prevent the defendant from setting up contributory negligence as a defense, and is on the ground that it would amount to a variation in pleading, *Louisville & N. R. R. Co. v. Marker*, 103 Ala. 160 (1893). But this is against the weight of authority, *Pa. Co. v. Krick*, 47 Ind. 368 (1874), on the ground that the degree of negligence is a matter of proof, not pleading: *Chicago, B. & Q. R. R. v. Carter*, 20 Ill. 390 (1858); *Louisville & N. R. R. Co. v. Mitchell*, 87 Ky. 327 (1888); *Schumacher v. St. Louis & S. F. R. R. Co.*, 39 Fed. 174 (1889). In those states where gross negligence implies wilfulness it would seem logical to hold that proof of gross negligence is not admissible where ordinary negligence is charged, and *vice versa*, and it is so held. *McClellan v. Chippewa Valley R. R. Co.*, 110 Wis. 326 (1910).

NEGLECT—GRATUITOUS UNDERTAKING—LIABILITY TO A SOCIAL GUEST.—Defendant invited plaintiff to ride with him in his automobile. Through the negligence of the chauffeur, plaintiff was injured. *Held*: The plaintiff could not recover. Proof of ordinary negligence is not enough, plaintiff must prove gross negligence to charge one who was transporting him free of charge. *Massaletti v. Fitzroy*, 118 N. E. 168 (Mass.).

The court argued that, according to *Coggs v. Barnard*, 2 Ld. Raym. 909 (1703), a depositary, *i. e.*, a gratuitous bailee, can only be charged by proof of gross negligence; that a mandatory, or one who undertakes a gratuitous transportation, is not chargeable by proof of less negligence than is required to charge a depositary; and that this was a case of a mandatory.

The distinctions of depositary, mandatory, *etc.*, made in *Coggs v. Barnard*, are distinctions with reference to the liability of one dealing with goods, not persons. To speak of a depositary or mandatory of a person is to make a person a chattel. The analogy between the principal case and a mandatory is vitiated by the fact that a carrier of persons is bound to exercise a higher degree of care than a carrier of goods. It is submitted that the liability to a social guest is more analogous to the liability of a licensor than to that of a mandatory.

The licensor owes the licensee the duty to refrain from any further negligence which will increase the dangers of the premises which he has permitted the licensee to come upon. *Gallagher v. Humphrey*, 6 Law Times N. S. 684 (1862); *Sweeny v. Old Colony R. R.*, 92 Mass. 368 (1865); *Barry v. N. Y. Central R. R.*, 92 N. Y. 289 (1883); *Taylor v. R. R.*, 113

Pa. 162 (1886); Mitchell v. R. R. 68 N. H. 96 (1894); Pomponio v. R. R., 66 Conn. 528 (1895). But a licensor is not bound to make the premises safe, short of not creating a trap. Batchelor v. Fortescue, L. R. 11 Q. B. D. 474 (1883); Fitzpatrick v. Cumberland Glass Co., 61 N. J. L. 378 (1898); Gibson v. Sziepienski, 37 Ill. App. 601 (1891); Monroe v. Atlantic Coast Line R. R., 151 N. C. 374 (1909); Schiffer v. Sauer Co., 238 Pa. 550 (1913). It has been held a number of times that this was the duty of one who invited another to ride with him, *i. e.*, to refrain from doing any negligent acts by which the danger was increased or a new danger created, although by *dicta* it is asserted that the host would not be bound to furnish a safe vehicle or a safe horse. Mayberry v. Sivey, 18 Kan. 291 (1877); Pigeon v. Lane, 80 Conn. 237 (1907); Patnode v. Foote, 138 N. Y. Supp. 221 (1912); Grimshaw v. Lake Shore, *etc.*, R. R., 98 N. E. 762 (1912), where it was held that one who was on a freight engine by invitation of the engineer was a licensee and entitled to ordinary care, though to be on the engine was against the rules of the company: Fitzgerald v. Boyd, 91 Atl. 547 (Md. 1914); Beard v. Klusmeier, 158 Ky. 153 (1914).

There is even authority for the proposition that failure to keep the premises in a reasonably safe condition constitutes negligence to a social guest as well as to a business guest. Davis v. Congregational Society, 129 Mass. 367 (1880); Howe v. Ohmart, 7 Ind. App. 32 (1897). *Contra*, Southcote v. Stanley, 1 Hurl. & N. 246 (1856). It may perhaps be argued that it is reasonable to imply from the express invitation given by the host to the guest, that the host has an interest in his guest's presence, and such an interest in his presence would put the social guest on the same footing as a business guest, and entitle him to demand reasonable care to keep the premises in a safe condition for him.

There is also authority for the assertion that one who actually enters on the execution of a gratuitous undertaking, and does it negligently, is liable to another injured thereby. Rehder v. Miller, 35 Pa. Super. Ct. 344 (1908). This has been held repeatedly where a landlord volunteers to repair, and does it so negligently that the tenant is injured. Benden v. Manning, 2 N. H. 289 (1830); Gill v. Middleton, 105 Mass. 477 (1870); Little v. McAdaras, 38 Mo. App. 187 (1889); Gregor v. Cady, 82 Me. 131 (1889); O'Dwyer v. O'Brien, 13 N. Y. App. Div. 570 (1897); Aldag v. Ott, 28 Ind. App. 542 (1901). In Massachusetts the doctrine of Gill v. Middleton has been restricted, so that while a tenant may recover for his landlord's negligence in repairing gratuitously, a guest of the tenant may not. Thomas v. Lane, 221 Mass. 447 (1915). In England, not even the tenant may recover. Malone v. Laskey, L. R. 1907, 2 K. B. D. 141. But in England it has been held that one undertaking a gratuitous transportation of a person is answerable for failure to exercise ordinary care. Harris v. Perry, 1903, 2 K. B. 219. This is *contra* to a *dictum* in Moffat v. Bateman, L. R. 3 P. C. 115 (1869), which, though cited in the principal case for the proposition that one gratuitously transporting another is liable only for gross negligence, was in reality decided on the ground that there was no evidence of even ordinary negligence.

TORTS—LIABILITY FOR INDUCING BREACH OF CONTRACT.—The defendant induced the plaintiff's fiancé to break off the engagement with her, by a threat to have him placed in an asylum. Slander had been used also, but the action for that was now barred by the Statute of Limitations. *Held*: The plaintiff cannot recover. *Homan v. Hall*, 165 N. W. 881 (Nebraska).

This is in accord with the authorities. In *Leonard v. Whetstone*, 34 Ind. App. 383 (1904); it was held that a parent is liable to his son's fiancée for slander against her in inducing him to break the engagement, but in a *dictum* it was said that without the slander no action would have lain. Where defendant debauched plaintiff's fiancée and alienated her affections, and the plaintiff in consequence broke off the engagement, it is held that the plaintiff has no cause of action. *Davis v. Condit*, 124 Minn. 395 (1914). There is no right of action for alienating the affections of a betrothed or even debauching her; such a right arises only from the marital relation. *Case v. Smith*, 107 Mich. 416 (1895).

A contract to get married seems to be unusual in that no action lies for inducing a breach of it. For other contracts there is at least a decided split of authority. Thus it is actionable nearly everywhere to induce a breach of contract between master and servant, or employer and employee, even though no means tortious in themselves are employed. *Read v. Friendly Society*, L. R. 1902, 2 K. B. D. 732; *Glamorgan Coal Co. v. South Wales Miner's Fed.*, L. R. 1903, 2 K. B. D. 545; *Walker v. Cronin*, 107 Mass. 555 (1871); *Flaccus v. Smith*, 199 Pa. 128 (1901); *Jersey City Printing Co. v. Cassidy*, 63 N. J. E. 759 (1902); *Huskie v. Griffin*, 75 N. H. 345 (1909); *Chiple v. Atkinson*, 23 Fla. 206 (1887), an action by the employee. But New York does not hold one who induces the breach of such a contract liable, where no tortious means are used, on the ground that the English Statute of Laborers, on which the early English cases based their decision that a master could recover for enticing away his servant, was not in force in New York. *National Protective Assn. v. Cummings*, 170 N. Y. 315 (1902). A contract for professional services is protected as is a master and servant contract from interference by a third party. *Lumley v. Gye*, 2 Ellis & B. 216 (1853). *Contra*, *DeJong v. Behrman*, 131 N. Y. Supp. 1083 (1911).

There is much less unanimity as to liability for inducing a breach of mercantile contracts, where the act inducing the breach is not itself a tort. Cases holding that one inducing the breach is not liable are: *Ashley v. Dixon*, 48 N. Y. 430 (1872); *Chambers v. Baldwin*, 91 Ky. 121 (1891); *Boyson v. Thorn*, 98 Cal. 578 (1893); *Glencoe Sand Co. v. Hudson Bros.*, 138 Mo. 439 (1897); *Sweeny v. Smith*, 171 Fed. 645 (1909); *Swain v. Johnson*, 151 N. C. 93 (1909); *Turner v. Fletcher*, 165 N. Y. Supp. 282 (1917). Cases holding that one who induces a breach of a contract is liable, are: *Bowen v. Hall*, L. R. 1881, 6 Q. B. D. 333; *Jones v. Stanly*, 76 N. C. 355 (1877); *Heath v. American Book Co.*, 97 Fed. 533 (1899); *Marten v. Reilly*, 109 Wis. 464 (1901); *Raymond v. Yarrington*, 96 Tex. 443 (1903); *Mahoney v. Roberts*, 110 S. W. 225 (Ark. 1908); *Motley Green Co. v. Detroit Steel Co.*, 161 Fed. 389 (1908); *American Melting Co. v. Keitel*, 209 Fed. 351 (1913); *Rivet Co. v. Exeter Boot Co.*, 159 Fed. 824 (1908); *Faunce v. Searles*, 142

N. W. 816 (Minn. 1913); Kock v. Burgess, 149 N. W. 858 (1914); Twitchell v. Nelson, 126 Minn. 423 (1914); Bowen v. Speer, 166 S. W. 1183 (1914); Wakin v. Wakin, 180 S. W. 471 (1915); Automobile Insurance Co. v. Guaranty Corp., 240 Fed. 222 (1917). Illinois apparently requires malice in fact to make the defendant liable. *Legrís v. Marcotte*, 129 Ill. App. 67 (1906).

Where contract is unenforceable or terminable at the will of the party induced to break it, it has been held that the one who induced the termination of the contract is liable. *Cumberland Glass Mfg. Co. v. Dewitt*, 120 Md. 386 (1913), where contract was unenforceable by the statute of frauds: *London Guarantee Co. v. Horn*, 206 Ill. 493 (1904), where, however, the means used by the defendant to induce the breach of contract was a threat to do something he had no legal right to do, namely, break a contract he had with the plaintiff's contracting party. But the weight of authority holds that the defendant is not liable unless the contract of which he induced the breach was a binding one. *Allen v. Flood*, L. R. 1898, A. C. 1; *Raycroft v. Tayntor*, 6 Vt. 219 (1896), where malice in fact existed, yet the defendant was held not liable: *McGuire v. Gerstly*, 204 U. S. 489 (1906), terminating partnership for no specified term; *Roberts v. Clark*, 103 S. W. 417 (Tex. 1907); *Tennessee Coal & Iron Co. v. Kelley*, 163 Ala. 348 (1909).

TORTS—NEGLIGENCE—WHO MAY RECOVER—UNDISCLOSED PRINCIPAL.—A telegram accepting an offer, addressed to the plaintiff's agent by a third party, was not promptly delivered by the defendant telegraph company. The goods offered were sold subsequently at a loss. *Held*: The plaintiff cannot recover damages for the defendant's negligence, because he was an undisclosed principal of the addressee. *W. Union Tel. Co. v. Lowden*, 77 So. 145 (Miss. 1917).

The right of the sendee of a telegram to recover for negligence on the company's part in the transmission of, or failure to deliver, a message is generally recognized throughout the United States. *Western Union v. Dubois*, 128 Ill. 248 (1889); *Young v. Western Union*, 107 N. C. 370 (1890); *Baily & Co. v. Western Union*, 227 Pa. 522 (1910). Two main theories on which recovery is allowed seem to prevail. One is that the telegraph company is a public agent, with a duty to transmit messages properly, imposed upon it by law, and is liable to anyone injured by its negligence in violation of that duty. Actions on this theory are *ex delicto*. *Wadsworth v. Western Union*, 86 Tenn. 695, 712 (1888); *Western Union v. Dubois*, *supra*; *Lee v. Western Union*, 51 Mo. App. 375 (1892). The other doctrine holds that the addressee is the beneficiary of the contract of transmission made by the sender and the company, and may sue the latter when deprived by its negligence of a benefit he would otherwise have had. The sendee's action under this rule is *ex contractu*. *Russell v. Western Union*, 57 Kan. 230 (1896); *Frazier v. Western Union*, 45 Ore. 414 (1904). It is often very hard to determine on which of these two theories the various decisions have been based, as the legal principles in this very modern field have not yet been well settled.

The few cases dealing with the right of the sendee's undisclosed prin-

principal to sue have uniformly denied him recovery. *Lee v. Western Union*, 51 Mo. App. 375, 380 (1892); *Western Union v. Schriver*, 141 Fed. 538 (1905). In support of this conclusion, decisions and *dicta* are cited to the effect that an addressee may recover from the telegraph company only when the company has knowledge or notice, from the message itself or other circumstances, that the message was intended for the sendee's benefit. *Western Union v. Coffin*, 88 Tex. 94 (1895); *Frazier v. Western Union*, *supra*; *Anniston Cordage Co. v. Western Union*, 161 Ala. 216 (1909). Since it is a simple rule of contracts that a third party must be intended as the beneficiary of the contract by both contracting parties before he can sue on it, this reasoning is properly applied in jurisdictions where the sendee recovers on the breach of the company's contract with the sender, because obviously the sendee's principal, if undisclosed to the company, could not have been intended by it as the beneficiary.

But in jurisdictions where the sendee recovers in tort, on the theory of a breach of a public duty, the same reasoning does not apply. A leading case under this doctrine states that the telegraph company is liable to the sendee because "from the peculiar character of its business, it is connected with the sendee of the message so far as to impose upon it a duty to deliver the intelligence. . . ." *Shingleur v. Western Union*, 72 Miss. 1030, 1035 (1895). The duty imposed is that of delivery—a duty which is owing only to that class of the public composed of addressees. Since the sendee's undisclosed principal is not a member of this class, he clearly should not recover since there has been no breach of a duty owing to him. It is on this broad principle of torts that the principal case should have gone, arising as it did in a jurisdiction where the sendee recovers on the tort, and not the contract, of the company. *Shingleur v. Western Union*, *supra*.

Of course the sender's undisclosed principal may always recover on the contract for losses actually sustained under the common doctrines of agency which allow him to step in and sue in his own name on a contract made by his agent. *West v. Western Union*, 39 Kan. 93 (1888); *Dodd v. Postal Tel. Co.*, 112 Ga. 685 (1900).